

1 ruling on the motion pending documentation of the withdrawal of the claim as noted in Fn. 1 of
2 Plaintiffs' Opposition Brief.

3
4 DATED: September 9, 2013



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6 Carl J. West
7 Judge of the Superior Court (Ret.)
8 Referee
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Re: Bagdasarian Productions LLC et al. vs. Twentieth Century Fox Film Corporation
Court Case No. CV 10-02991 MWF (JCGx)
JAMS Reference No. 1220044628

I, Kathryn Cisneros, not a party to the within action, hereby declare that on September 09, 2013 I served the attached **ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF BAGDASARIAN PRODUCTION'S MOTION FOR LEAVE TO AMEND THE FIRST AMENDED COMPLAINT (2) DENYING DEFENDANT TWENTIETH CENTURY FOX'S MOTION FOR PARTIAL SUMMARY JUDGMENT** on the parties in the within action by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, Los Angeles, CALIFORNIA, addressed as follows:

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Hon. Michael W. Fitzgerald
U.S. District Court
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I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA, on September 09, 2013.



Kathryn Cisneros

EXHIBIT 5

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5 Referee

6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 BAGDASARIAN PRODUCTIONS,
LLC, a California limited liability
12 company, and JANICE KARMAN, an
individual,
13

14 Plaintiffs,

15 v.

16
17 TWENTIETH CENTURY FOX FILM
CORPORATION, a Delaware
18 corporation,
19

Defendant.
20

Case No. CV 10-02991 MWF (JCGx)

JAMS Ref. No. 1220044628

ORDER

21
22 **I. Introduction**

23 Plaintiffs Bagdasarian Productions, LLC ("BP") and Janice Karman
24 ("Karman") (collectively, "Plaintiffs") brought an action against Defendant
25 Twentieth Century Fox Film Corporation ("Fox") in the United States District Court
26 for the Central District of California. On June 14, 2012, this action was referred
27 under Cal. Code Civ. Proc. § 638 to the undersigned referee ("Referee").
28 Subsequently, Plaintiffs filed a Second Amended Complaint for Declaration of

1 Copyright of Co-Ownership of Copyright and Accounting for Profits, Copyright
2 Infringement, Unjust Enrichment, Breach of Implied Contract, and Breach of
3 Contract. Currently before the Referee is:

4 (1) Fox's Motion for Summary Judgment;

5 (2) BP's Motion for Partial Summary Judgment on Certain Breach of Contract
6 Claims;

7 (3) Karman's Motion of Partial Summary Judgment on Implied Contract
8 Claims; and

9 (4) Fox's Application Pursuant to FRCP 56(d).

10 **II. Standards**

11 **A. Motion for Summary Judgment**

12 Under the Federal Rules of Civil Procedure, summary judgment is
13 proper only where the pleadings, depositions, answers to interrogatories, and
14 admissions on file, together with the affidavits, if any, show that there is no genuine
15 issue as to any material fact and that the moving party is entitled to a judgment as a
16 matter of law.@ Fed. R. Civ. P. 56(c). The moving party has the burden of proof
17 demonstrating the absence of a genuine issue of fact for trial. See Anderson v.
18 Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). It may point to the absence of the
19 nonmovant's evidence (see Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970)),
20 or present its own evidence to negate an element of the nonmovant's claim. See
21 Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party satisfies the
22 burden, the party opposing the motion must set forth specific facts showing that there
23 remains a genuine issue for trial. See Anderson, 477 U.S. at 256; Fed. R. Civ. P.
24 56(e).

25 **B. Contract Interpretation**

26 The interpretation of written contracts is an issue of law for the court.
27 Powers v. Dickson, Carlson & Campillo, 54 Cal. App. 4th 1102, 1111 (1997) ("Our
28 Supreme Court long ago established that interpretation of a written instrument, even

1 thought it involves what might properly be called questions of fact, is essentially a
2 judicial function to be exercised according to the generally accepted canons of
3 interpretation so that the purposes of the instrument may be given effect.” “[A]
4 contract must be interpreted as to give effect to the mutual intention of the parties as
5 it existed at the time of contracting, so far as the same is ascertainable and lawful.”
6 Cal. Civ. Code § 1636. Further, “[t]he whole of a contract is to be taken together, so
7 as to give effect to every part, if reasonably practicable, each clause helping to
8 interpret the other.” *Id.* at § 1641.

9 Extrinsic evidence may be admitted to assist contract interpretation only
10 when it is competent and only to prove a meaning to which the language is
11 reasonably susceptible. The contract must be understood “by reference to the
12 circumstances under which it was made, and the matter to which it relates.” Cal.
13 Civ. Code § 1647. Those circumstances include the acts of the parties showing what
14 they believed the contract to mean, before any controversy has arisen as to its
15 meaning. *DVD Copy Control Ass’n v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 712
16 (2009) (citing 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 749, p.
17 838). Such evidence may include the post-contracting conduct of the parties. *Id.*

18 **III. Motions for Summary Judgment Re Breach of Express Contract Claims**

19 In the Second Amended Complaint (“SAC”), BP alleges that Fox
20 breached the parties’ Purchaser/Producer Agreement – Literary Materials – “Alvin
21 and the Chipmunks” dated March 26, 2004 (“Agreement”) by (1) treating up-front
22 “Purchase Price” money for sequels as a recoupable advance against contingent
23 compensation; (2) paying soundtrack royalties for Alvin and the Chipmunks
24 (“Alvin”) and Alvin and the Chipmunks: The Squeakquel (“The Squeakquel”) net of
25 standard deductions; and (3) failing to report the correct amount of pay-television
26 revenue in connection with the films. Fox seeks summary judgment with respect to
27 the breach of contract claim based on the Purchase Price, and both Fox and BP seek
28 summary judgment with respect to the breach of contract claims based on the

1 soundtrack royalties and pay-television revenue. As the parties acknowledge, the
2 rules of contract interpretation apply to the determination of these claims.

3 **A. Breach of Contract Claim Based on the Purchase Price**

4 In Count VII of the SAC, BP alleges that Fox breached the parties'
5 Agreement by treating the "Purchase Price" described in Paragraph 6 as an advance
6 for sequels or remakes. In seeking summary judgment on this claim, Fox contends
7 that the unambiguous language of the Agreement is that "[f]or each Picture," the
8 contingent compensation is only payable "subject to" the treatment of the Purchase
9 Price as an advance against that compensation. In opposition, BP contends that
10 disputed issues of material fact preclude the entry of summary judgment for Fox on
11 this claim. It argues that BP must be paid a non-recoupable upfront payment in
12 addition to Contingent Compensation for sequels.¹

13 **1. The language of the Agreement supports the interpretation**
14 **that the Purchase Price is an advance against Contingent**
15 **Compensation "for each Picture"**

16 The Agreement provides as follows:

17 6. PURCHASE PRICE: As consideration in full for the Granted
18 Rights and for the representations, warranties and agreements made by
19 Owner, Fox shall to pay to Owner within 10 business days after exercise
20 of the Option the sum of \$3,000,000 . . . ("Purchase Price") less the
21 amount paid to Owner for the Initial Option Period. The Purchase Price
22 shall be deemed an advance against the Contingent Compensation
(defined below).

23 ¹ At the outset, BP argues that Fox's current Motion for Summary Judgment should be
24 denied because the Referee already has decided that the Purchase Price issue is
25 incapable of resolution by dispositive motion as a result of factual disputes.
26 However, as set forth in the prior Order Denying Fox's Motion for Partial Summary
27 Judgment, the Referee stated that "the court may entertain extrinsic evidence to assist
28 both in interpreting the agreement and in determining the intent of the parties."
(9/9/13 Order at 12:12-15.) As both parties note, the prior motion was based on a
limited record. In this current Motion, both parties have conducted discovery, and
extrinsic evidence has been submitted by both parties. As such, based on a more
fully developed evidentiary showing, the determination is whether triable issues of
material fact exist.

1
2 7. ADDITIONAL PAYMENTS: For each Picture that Fox
3 produces and releases, Owner shall be paid:

4 (a) Contingent Compensation: Subject to the last sentence of
5 Paragraph 6, Lender shall be paid "Contingent Compensation"
6 equal to 2 1/2% of 100% of the "Defined Gross Proceeds" (as
7 defined in the Participation Definition) from "1st dollar" of the
8 Picture.

9 (Agreement, ¶¶ 6-7(a).)

10 The Agreement further provides:

11 12. STUDIO SEQUELS AND REMAKES: Within 10 business days
12 after the commencement of principal photography of the applicable
13 studio sequel or remake, Owner shall receive:

14 (a) Sequels: an amount equal to (i) the Purchase Price, and (ii)
15 a percentage of the Defined Gross Proceeds of such sequel equal
16 to the rate of percentage participation in the Defined Gross
17 proceeds from "1st dollar" of the Picture payable pursuant to
18 Paragraph 7.

19 (Agreement, ¶ 12(a).)

20 The Arbitrator agrees with Fox that under this language, payment of
21 Contingent Compensation "[f]or each Picture" as set forth in Paragraph 7 is subject
22 to the Purchase Price being "deemed an advance against the Contingent
23 Compensation" as set forth in the last sentence of Paragraph 6. Use of the words "for
24 each Picture" means that this applies to sequels, and contrary to BP's assertion, not
25 just to the first picture.

26 BP argues that under Paragraph 12, what Fox pays for sequels is
27 described as "an amount equal to (i) the Purchase Price," and this cannot be equated
28 with the "Purchase Price." In other words, according to BP, something other than the
"Purchase Price" is paid for sequels. BP additionally argues that the payment of the
"Purchase Price" is tied to a specific event that occurs only once - "within 10 days

1 after the exercise of Option,” while the payment of the advance for the sequel is tied
2 to a different event - “within 10 business days after commencement of principal
3 photography of the applicable studio sequel.” It concludes that this limits the
4 Purchase Price to the first picture only.

5 With respect to BP’s reference to “an amount equal to (i) the Purchase
6 Price,” BP’s interpretation is that the phrase “an amount equal to” negates the
7 specific language that the “Purchase Price shall be deemed an advance against the
8 contingent compensation” for “each Picture.” However, the words “an amount equal
9 to” can be interpreted in their ordinary meaning consistent with the remaining terms
10 of the Agreement to reflect that the Purchase Price is an advance for each picture.
11 The pertinent language provides: “an amount equal to (i) the Purchase Price, and (ii)
12 a percentage of the Defined Gross Proceeds of such sequel equal to the rate of
13 percentage participation . . . payable pursuant to Paragraph 7.” In other words, BP
14 receives a total of two things: the Purchase Price and the contingent compensation of
15 Paragraph 7, with that amount subject to the requirement that the Purchase Price is
16 “deemed an advance” for “each picture.” Under BP’s interpretation, the language of
17 Paragraph 7 would be negated. This is contrary to the canon that all provisions of a
18 contract are to be given effect, each provision helping to explain the other, not to
19 create unexplainable contradictions. See Civ. Code § 1641; F.T.C. v. EDebitPay,
20 LLC, 695 F.3d 938, 944 (9th Cir. 2012) (rejecting defendants’ interpretation because
21 it would render certain contract phrases inoperative or meaningless).

22 With respect to BP’s argument that it receives something other than the
23 Purchase Price for sequels because the Purchase Price is “tied to a specific event,”
24 this interpretation ignores the language of Paragraph 7, which provides the Purchase
25 Price is deemed an advance for contingent compensation paid “for each Picture.”
26 Furthermore, while Paragraph 6 does specify when the Purchase Price will be paid, it
27 does not limit the definition of Purchase Price to that single payment. Similarly,
28 Paragraph 12 specifies the timing of the payment of the Purchase Price for a sequel,

1 but nothing suggests the parties intended the payment for sequels to be non-
2 recoupable.

3 In sum, the parties expressed in the Agreement that Contingent
4 Compensation “[f]or each Picture,” not just the first picture, is “subject to” treating
5 the Purchase Price as an advance. There would be no reason for Paragraph 7 to
6 specify that “for each Picture,” payment of Contingent Compensation is “subject to
7 the last sentence of paragraph 6,” providing that the Purchase Price is deemed an
8 advance. BP acknowledges that “for each picture” BP receives Contingent
9 Compensation pursuant to Paragraph 7. Yet, it would ignore the first phrase
10 “[s]ubject to the last sentence of Paragraph 6” when it applies the definition of
11 Contingent Compensation in Paragraph 7(a) to payments for sequels. Instead, BP
12 attempts to argue that the phrase “[s]ubject to the last sentence of Paragraph 6” in
13 Paragraph 7(a) applies only to the upfront payment for the first picture. This is a
14 strained interpretation that would ignore provisions of the Agreement. Thus, the
15 Referee finds that the plain language of the Agreement controls and provides that the
16 Purchase Price is a recoupable advance against Contingent Compensation for each
17 picture.

18 **2. Extrinsic Evidence supports the meaning of the plain**
19 **language of the Agreement**

20 **(a) Extrinsic evidence surrounding the negotiations and**
21 **drafting**

22 In support of its Motion, Fox contends that the extrinsic evidence of the
23 parties’ negotiations confirms that the Agreement means what it says. The Referee
24 agrees with Fox.

25 It is undisputed that Stephen Plum (“Plum”) negotiated the Agreement
26 on behalf of Fox, and Steve Waterman (“Waterman”) negotiated on behalf of
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1 Plaintiffs. (Fox's MSJ, UF 1-2.)² The parties documented the deal only after Plum
2 and Waterman expressed their shared understanding in writing that the Purchase
3 Price would be an advance against BPL's profit participations. (*Id.* at UF 3; *see* Plum
4 Dec., ¶9, Ex. 4 (Waterman November 21, 2003 memo expressing a "meeting of the
5 minds" that "PURCHASE PRICE AND BAGDASARIAN PRODUCING FEES"
6 would be \$3 million, "applicable against profit participations" of 2.5% first dollar
7 gross).) At no point in the negotiation did Waterman or anyone from BP propose to
8 treat the Purchase Price differently for sequels than the first picture—*i.e.*, make it
9 nonrecoupable for sequels. (*Id.* at UF 4.)

10 In response, BP argues that even if Waterman had agreed to accept the
11 same compensation for each film, that agreement would have exceeded his authority
12 with respect to the negotiations and thus could not bind BP. It claims that Fox knew
13 that Waterman was not authorized to agree to any deal point without consulting
14 Bagdasarian. However, the evidence does not support BP's claim. First, Waterman
15 expressly affirmed to Fox that the parties had reached agreement on the points in the
16 November 21, 2003 memorandum, and this is chargeable to BP as a matter of law.
17 *See* Civil Code § 2332; *O'Riordan v. Fed. Kemper Life Assur.*, 36 Cal. 4th 281, 288
18 (2005) (agent's knowledge is imputed to principal even if not actually communicated
19 to the principal). Moreover, after the November 2003 exchange, the parties never
20 again discussed the issue whether the Purchase Price would be an advance against
21 contingent compensation. (Plum Decl., ¶ 12.) The parties documented the deal
22 based on the understanding reflected in the November 2003 memorandum. BP never
23 repudiated the understanding that the Purchase Price would be an advance against its
24 profit participations, but instead executed the Agreement which provided that, "for
25 each Picture," contingent compensation is only payable if the Purchase Price is

26
27 ² The Referee makes the findings of fact based on the referenced Separate Statements of
28 Undisputed Facts, the Statements of Genuine Disputes of Material Fact, and the Responses
to the Statements of Genuine Disputes.

1 deemed an advance. As such, BP ratified the parties' deal by signing the Agreement
2 negotiated by Waterman. Gladium Co. v. Thatcher, 95 Cal. App. 85, 91 (1928)
3 (acceptance of contract precludes principal from denying authority of agent through
4 whom it was consummated).

5 BP argues that, as testified to by Bagdasarian, it was adamant that it
6 receive more compensation for sequels than for the first picture. However, even
7 assuming this is true, there is no evidence that BP expressed its subjective intent that
8 the Purchase Price would be non-recoupable for sequels. "The true intent of a
9 contracting party is irrelevant if it remains unexpressed." Crow v. P.E.G.
10 Construction Co., Inc., 156 Cal. App. 2d 271, 278-279 (1957). Put another way,
11 BP's desire for "more" for sequels doesn't equate to a demand to treat the Purchase
12 Price as a non-recoupable advance for sequels. It is undisputed that Fox expressed
13 that the Purchase Price would be recoupable against contingent compensation, and
14 the sequels would be treated the same. BP points to no evidence that it ever
15 suggested at that time that the Purchase Price would be recoupable for the first
16 picture only.

17 BP points to the exchange of drafts and its proposal of additional
18 language to Paragraph 6 to clarify that the Purchase Price was "for the first motion
19 picture." (See Plum Ex. 5 at BP00000284.) It states that Fox deleted that language
20 in the next draft it circulated without explanation, and the parties did not include that
21 language in the final Agreement. It claims that this was because the language was
22 "unnecessary," as Bagdasarian testified. According to BP, the language of Paragraph
23 6 when read with Paragraph 12, was clear without the language BP proposed. It was
24 clear to BP that the Purchase Price was paid only once, "within 10 business days
25 after exercise of the Option," and a separate paragraph dealing with sequel
26 compensation provided more for sequels. However, BP relies on the undisclosed,
27 subjective intent of Bagdasarian that the language was "unnecessary." BP did not
28 say anything to Fox about the change it proposed; it provided its draft with no

1 explanation, and then it accepted Fox's rejection without explanation. (Fox's MSJ,
2 UF 14.) Contract interpretation follows the objective rule of contracts where only
3 what the parties say in the Agreement or to each other has any bearing. Civ. Code §
4 1639. As such, the Referee finds that the extrinsic evidence of the negotiating
5 history confirms the interpretation found above that the Agreement means what it
6 says.

7 **(b) Extrinsic evidence of Fox's other deals and templates**

8 Fox submits evidence that none of its other third-party agreements
9 provide that a "Purchase Price" or its equivalent is recoupable against contingent
10 compensation for a first picture but non-recoupable for subsequent pictures.
11 (Karasik Del., ¶ 11, Ex. F.) It claims that the third-party agreements validate that the
12 most Fox agreed to pay for sequels is the same as what is paid for the original
13 picture. It states that its templates further demonstrate that Fox's standard practice to
14 pay one-half of the compensation for sequels paid for the preceding picture. (UF 10;
15 Plum Decl., ¶ 7, Ex. 2; Karasik Decl., ¶ 11.)

16 BP argues that the third-party agreements produced by Fox support BP's
17 understanding that the language of Paragraph 12 means that the advance given in
18 connection with the sequels is non-recoupable. It claims that Fox's practice of using
19 language nearly identical to that of Paragraph 12 in net proceeds deals, which Fox
20 admits involve non-recoupable advances, is in fact consistent with BP's
21 interpretation of Paragraph 12. (Plaintiffs' Opp, Ex. N; Ex. O at 116:18-117:7.) As
22 Fox explains, however, "net" deals are fundamentally different from First Dollar
23 Gross deals. Fox's "First Dollar Gross" forms specify that up-front money is always
24 an advance against contingent compensation in such deals. (Karasik Decl., ¶ 11, Ex.
25 F, Plum Depo. at 110:21-114:18; Plum Decl., Ex. 1.) The form pertaining to First
26 Dollar Gross deals requires that the following language be used: "the Fixed
27 Compensation . . . shall be deemed an advance against the Contingent
28 Compensation." (Fox's MSJ, UF 10; Plum Decl., ¶ 7, Ex. 2; Karasik Decl., Ex. N.)

1 This is consistent with the Agreement. Thus, Fox's agreements with other third-
2 parties confirm that Fox has never entered into a deal like the one BP seeks to have.
3 BP points to no deal wherein Fox has agreed to treat a Purchase Price as recoupable
4 on the first picture and non-recoupable on sequels.

5 **3. Summary Judgment in favor of Fox is warranted with respect**
6 **to the breach of contract claim based on the Purchase Price**

7 Thus, the Agreement provides that the Purchase Price is "deemed an
8 advance" for "each picture" and that the Contingent Compensation payable to BP is
9 subject to the Purchase Price being treated as an advance. (Agreement, ¶¶ 6, 7, 12.)
10 The Referee determines that the plain language of the Agreement as supported by the
11 undisputed extrinsic evidence provides that the Purchase Price is an advance for
12 sequels, as it is for the first picture. As such, because there are no genuine issues of
13 material fact, Fox is entitled to judgment as a matter of law on this claim.

14 **B. Breach of Contract Claims Based on the Soundtrack Royalty**

15 In Count VII of the SAC, BP alleges that Fox breached the parties'
16 Agreement when calculating BP's royalties for the soundtrack albums for the two
17 films, Alvin and The Squeakquel. Both BP and Fox seek summary judgment with
18 respect to this claim.

19 **1. With respect to Alvin, the deductions taken were proper**
20 **under the Agreement**

21 BP contends that its royalty based on the full suggested retail list price
22 ("SLRP") should not have been reduced by "free goods" or deductions taken by the
23 Record Company, including packaging deductions and royalty rate deductions that
24 governed foreign territories. Specifically, BP claims that Fox reduced the royalty
25 base by 25% for nonexistent "packaging" expenses and another 25% for the fact that
26 the sales were in the form of digital downloads. It also claims that Fox failed to
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1 report any royalties on sales of over 300,000 Alvin soundtrack albums.³ BP
2 concludes that Fox underpaid royalties on top-line album sales of the Alvin
3 soundtrack in the U.S. and Canada through December 31, 2012, by at least \$911,185.
4 (Tregellis Decl., ¶ 27.) Fox, on the other hand, contends that BP's soundtrack claims
5 fail because the Agreement expressly provides that BP's Soundtrack Royalties are
6 subject to all deductions applicable under Fox's contract with the Record Company.
7 For the Alvin soundtrack, Fox contracted with Razor & Tie ("R&T"), and Fox states
8 that its contract with R&T provides for all of the reductions and deductions from
9 Soundtrack Royalties that BP currently challenges.

10 **(a) The plain language of the Agreement**

11 It is undisputed that Paragraph 10 of the Agreement entitles BP to
12 "Soundtrack Royalties." It provides as follows:

13 10. SOUNDTRACK ROYALTY: Owner shall be entitled to the
14 following record royalties (collectively, "Soundtrack Royalty"), as
15 applicable:

16 **(a) US & Canada Soundtrack Album Sales:**

17 **(i) Rights Royalty:** For net sales of any top line album
18 sold in any and all distribution channels . . . in the United
19 States and Canada:

20 **(A) Rights Royalty:** a base phonorecord royalty
21 equal to 1% of the suggested retail list price
22 ("SRLP") thereof for such Soundtrack Album Sales .
.., and

23 **(B) Artist/Producer Royalty:** a base phonorecord
24 royalty equal to 13% of SRLP Said royalty to
25 be pro rated by the number of "tracks" on which
26 Artist renders services.

27 ³ This part of BP's breach of contract claim related to the soundtrack royalties for Alvin is
28 addressed in Section V below.

1 (b) Other Royalty-Bearing Sales: Soundtrack Royalties shall
2 be reduced, computed, paid, and defined (including for all other
3 phonorecords, including singles, and all international Soundtrack
4 Album Sales) in accordance with the distribution agreement
5 between Fox and the Soundtrack Album distributor ('Record
6 Company').
7 (Agreement, ¶ 10(a) and (b).)⁴

8 Fox claims that Paragraph 10(a) provides the base royalty rates
9 applicable for "top line albums" sold in the United States and Canada, and Paragraph
10 10(b) provides that the Soundtrack Royalties will be "reduced, computed, calculated,
11 paid and defined" in accordance with Fox's contract with the record company
12 handling distribution of the soundtrack. By contrast, BP argues that only Paragraph
13 10(a) applies and does not permit deductions. It claims that Fox improperly relies on
14 Paragraph 10(b) which applies only to "Other Royalty-Bearing Sales" – i.e. sales
15 other than top-line album sales in the U.S. and Canada, which are the sales described
16 in the preceding Paragraph 10(a).

17 The Referee agrees with Fox's application of both Paragraph 10(a) and
18 Paragraph 10(b) to permit the deductions at issue. "Soundtrack Royalty" in
19 Paragraph 10 is a defined term, and Paragraph 10(b) addresses the same defined
20 term, "Soundtrack Royalties," not any limitation of that term to non-top-line sales
21 and/or those outside the U.S. or Canada. Soundtrack Royalties in Paragraph 10(b) by
22 definition includes the royalties detailed in Paragraph 10(a). In addition, the terms
23 "net sales" and "base phonorecord royalty"⁵ in Paragraph 10(a) signal that
24 adjustments are to be made, and Paragraph 10(b) sets forth where to look to find
25 those adjustments – "in accordance with the distribution agreement between Fox and
26

27 ⁴ The parties agreed to use an "Artist/Royalty" of 9.75%, for a total of 10.75% when
28 combined with the 1% "Right Royalty."

⁵ "Net sales" means all sales exclusive of any albums returned or given away (i.e. "free
goods," typically for promotional purposes). (Cavanaugh Decl., ¶ 7.) "Base" means the
starting point before any deductions or adjustments are taken. (*Id.*)

1 the Soundtrack Album distributor.” Moreover, Paragraph 10(b) notes that it
2 addresses Soundtrack Royalties “including for all other phonorecords.” Contrary to
3 BP’s assertion, the word “including” means the royalties specified under Paragraph
4 10(a), and the word “other” refers to royalties other than those specified in Paragraph
5 10(a). Under BP’s construction, these words would be superfluous.

6 BP asserts that the heading of Paragraph 10(b), “Other Royalty-Bearing
7 Sales,” means sales other than top-line album sales in the U.S. and Canada. The
8 Referee agrees that this heading may appear to be misleading.⁶ However, the
9 paragraph explaining this heading uses the term “Soundtrack Royalties,” which, as
10 explained above, includes the royalties described in Paragraph 10(a), and further
11 addresses Soundtrack Royalties “*including* for all other phonorecords.” BP’s
12 proposed construction would strictly interpret the heading of the paragraph while
13 ignoring certain phrases of the paragraph defining that heading. The Referee must
14 interpret the Agreement “to effectuate every provision and not in a way that renders
15 some clauses nugatory, inoperative or meaningless.” United Artists Corp. v. Strand
16 Productions, Inc., 216 F.2d 305, 310 (9th Cir. 1954).

17 BP additionally argues that even if Paragraph 10(b) would be applied to
18 top-line album sales in the U.S. and Canada, any deductions taken under Paragraph
19 10(b) would be limited by Paragraph 10(c), which provides that BP’s soundtrack
20 royalty “shall be subject to the same Record Company policies and practices as are
21 applicable to Fox.” BP asserts that Fox is not subject to the same policies and
22 practices because Fox has “joint venture” deals with the Record Companies and is
23 not subject to any of the “standard deductions” by which Fox seeks to reduce BP’s

24
25 ⁶ The Referee disagrees with Fox that this heading can be ignored pursuant to Section
26 VIII(H) of Exhibit A which provides that “captions of paragraphs hereof are inserted for
27 reference only and in no way define, limit or describe the scope or intent of any provision
28 hereof” (Agreement, Exhibit A, Section VIII(H).) This provision applies only to
language found in Exhibit A “Definition of Net Proceeds.” There is no similar provision in
the Agreement itself. While BP previously relied on Section VIII(H) and argued that
headings could not be relied upon, BP did so in the context of contingent compensation.

1 royalty. However, application of Paragraph 10(c) in the manner suggested by BP
2 would ignore the specific provisions of Paragraph 10(a) and (b) that specify the
3 Soundtrack Royalties payable to BP. As Fox asserts, the “policies and practices”
4 referred to in Paragraph 10(c) make more sense when interpreted as accounting
5 practices. Indeed, Paragraph 10(c) is entitled “Computation” and is a general
6 provision that cannot override the detailed provisions addressing Soundtrack
7 Royalties.

8 In sum, the Referee finds that application of the plain language of the
9 Agreement permits the challenged deductions to the Soundtrack Royalties for Alvin
10 in accordance with Fox’s contract with R&T.

11 **(b) Extrinsic evidence**

12 Fox further contends that the extrinsic evidence confirms BP’s
13 understanding that deductions would be taken. It contends that BP received the
14 soundtrack agreement between Fox and R&T, exclusive of the exhibits attached
15 thereto, in January 2008, which referenced that third-party royalties would be
16 computed on SRLP of the album “with customary reductions,” and understood by at
17 least April 2008 that free goods and packaging deductions were being taken when it
18 received two soundtrack royalty statements (through the March 2008 period) that
19 detailed these deductions.

20 BP contends that when Bagdasarian discussed the deductions taken
21 under the R&T deal with Fox, he was not aware that BP was subject to any
22 deductions to which Fox was not also subject. It claims that it was not until much
23 later when Bagdasarian learned that BP and Fox were not being paid in the same
24 manner, and as a result, Bagdasarian’s conduct in 2009 cannot be taken to represent
25 BP’s approval of Fox’s practice of exempting itself from “standard deductions”
26 while subjecting BP to them.

1 It is undisputed that BP received the main body of the R&T Contract in
2 January 2008. (Fox's MSJ, UF 37.) Paragraph 5 of this contract provides that
3 royalty participants would receive their royalties "with customary reductions (e.g.,
4 25% packaging deduction, automatic 20% free goods deduction, $\frac{3}{4}$ reduction for
5 mid-priced records, etc.)." (*Id.*) Paragraph 6 provides that "all Net Profits for the
6 Soundtrack Album and Masters distributed by [R&T] pursuant to this Agreement
7 will be split 50/50 between RT and [Fox]." (*Id.*) BP does not dispute receiving the
8 R&T contract but instead argues that it was unaware that Fox wasn't receiving the
9 same deductions as it was. The Referee finds, however, that this cannot support BP's
10 breach of contract claim which alleges that the deductions, by themselves, constitute
11 a breach.

12 In April 2008, Bagdasarian complained that the deductions being taken
13 were "very high." (1st Cavanaugh Decl., ¶ 19, Ex. 3.) In a subsequent conversation
14 to address Bagdasarian's concerns, Cavanaugh clarified to Bagdasarian the nature of
15 the soundtrack deal in terms of Fox's and BP's respective payment streams and the
16 application of deductions to all royalty participants. (*Id.* at ¶ 20.) In addressing this
17 conversation, Bagdasarian states that when he approached Fox in April 2008 about
18 the R&T deal, he was not aware that BP was subject to any deductions to which Fox
19 was not. (Plaintiffs' Opp. to Fox MSJ, Ex. F at 175:17-177:19, 186:22-23.)
20 However, again, this shows that Bagdasarian's complaint was not that the deductions
21 were improper but that, as Bagdasarian asserts, he believed "the deal [with R&T]
22 was bad for both of them in the same manner." Further, Minks of BP also had a
23 discussion with Cavanaugh relating to the fact that BP "felt too many deductions
24 were being taken off of [BP's] share." (Ruga Decl., Ex. 23, Minks Depo. at 220:11-
25 221:14.) This extrinsic evidence of course of conduct before a dispute was raised is
26 among the most reliable in determining the parties' real intent. Crestview
27 Cemetery Ass'n v. Dieden, 54 Cal. 2d 744, 752 (1960) ("The acts of the parties under
28

1 the contract afford one of the most reliable means of arriving at their intention”);
2 Oceanside 84, Ltd. v. Fid. Fed. Bank, 56 Cal. App. 4th 1441, 1449 (1997) (“the
3 conduct of the parties after the execution of the contract, and before any controversy
4 arose, may be considered in order to attempt to ascertain the parties' intention”).⁷

5 **2. With respect to The Squeakquel, the deductions taken were**
6 **proper under the Agreement**

7 **(a) Plain language of the Agreement**

8 With respect to the Squeakquel, BP contends that calculating BP's
9 royalties based upon the wholesale price or PPD (Purchase Price to Dealer) rather
10 than the SRLP breached the Agreement. It contends that it was entitled to a royalty
11 based on SRLP (e.g. \$18.98/album) not PPD (e.g., \$12.05/album). BP claims that
12 Fox underpaid royalties on top-line album sales of The Squeakquel soundtrack in the
13 U.S. and Canada through June 30, 2012, by at least \$527,944. Fox, by contrast,
14 contends that the PPD calculations under its record company contract with Rhino
15 Entertainment Company (“Rhino”) are the dollars-and-cents equivalent of payments
16 based on SRLP with deductions. It claims that Rhino would not have agreed to pay
17 third-party royalties keyed to SRLP unless it applied standard deductions, and it paid
18 on a PPD basis with the intent of affording BP the equivalent of SRLP with
19 deductions.

20 In applying the language of the Agreement to The Squeakquel royalty
21 payments, the parties rely on the same arguments as discussed above with respect to
22 Alvin. For the reasons explained above, the Referee finds that the plain language of
23

24 ⁷ Furthermore, the Referee also agrees with Fox that BP's own auditor's testimony is
25 consistent with the plain language of the Agreement and supports the interpretation
26 determined herein. BP hired Gelfand, Rennert & Feldman to conduct a financial audit in
27 connection with Alvin. (Fox MSJ, UF 27.) George Cavelli testified on behalf of the audit
28 firm that except for his contentions in this case, he had never audited an SRLP-based record
royalty deal that did not allow for deductions, that it would be “unusual” for an SRLP
royalty deal to not be subject to deductions, and that packaging deductions for physical
goods and territorial reductions are common in the music industry. (*Id.*)

1 the Agreement permitted the challenged deductions to the Soundtrack Royalties for
2 The Squeakquel in accordance with Fox's contract with Rhino.

3 **(b) Extrinsic evidence**

4 BP does not dispute that prior to executing the soundtrack contract with
5 Rhino, Fox provided BP with a copy of Exhibit A to the Rhino contract which
6 indicated that certain deductions or reductions would be taken in calculating third-
7 party royalties and that Rhino would be computing the royalties based on the PPD
8 method. (Fox MSJ, UF 32.) Under Exhibit A, the royalty rate for net sales of
9 records sold for distribution in Canada is 85% of the applicable U.S. rate. (*Id.* at UF
10 33.) Further, it is undisputed that BP never asserted that the Agreement did not
11 permit deductions in calculating third-party royalties or that PPD would be
12 inconsistent with the Agreement at any time before Fox executed the Rhino Contract
13 in July 2009. (*Id.* at UF 34.) Finally, it is undisputed that when BP sued Fox in
14 April 2010, it did not claim Fox breached the Agreement by taking deductions in
15 calculating royalties or by using PPD in the Rhino contract. (*Id.*) In response to the
16 above, BP argues that such evidence is irrelevant as Fox is obliged to pay BP a
17 Soundtrack Royalty pursuant to the terms of the Agreement, not the terms of the
18 Rhino contract. However, contrary to BP's assertion, its conduct demonstrates its
19 pre-dispute understanding that the Agreement permitted deductions in calculation of
20 its royalties.

21 **3. Summary judgment in favor of Fox is warranted with respect**
22 **to the breach of contract claims based on the Soundtrack**
23 **Royalties**

24 The Referee finds that BP's soundtrack claims fail as a matter of law
25 because the Agreement as supported by the extrinsic evidence provides that BP's
26 Soundtrack Royalties are subject to all deductions applicable under Fox's contract
27
28

1 with the Record Company.⁸ Fox is therefore entitled to summary judgment with
2 respect to the breach of contract claims based on the soundtrack royalties.⁹

3 **4. BP is not entitled to summary judgment with respect to its**
4 **breach of contract claim based on the record company deals**

5 BP contends that Fox's deals with R&T and Rhino were a
6 discriminatory exercise of Fox's business judgment in violation of Section
7 VIII(BB)(1) of Exhibit A to the ST&C, which provides, "The exercise by Fox of its
8 sole business judgment hereunder shall be on a reasonable and non-discriminatory
9 basis." Specifically, BP argues that Fox entered into record deals that saddle BP's
10 royalty with onerous deductions in an effort to increase the profit pool that Fox
11 shares with record companies. It seeks summary judgment with respect to this claim.
12 Fox responds that there is no evidence that it discriminated against BP in any respect
13 as Fox treated BP the same as all similarly situated persons.

14 The Referee finds that BP fails to make a sufficient showing in support
15 of this claim. First, the evidence shows that there were other third-party royalty
16 participants to the two soundtracks, and they were also subject to the record
17 company's standard deductions and reductions. (1st Cavanaugh Decl., ¶¶ 18, 31-35;
18 2nd Cavanaugh Decl., ¶ 4.) BP argues that these other royalty participants were not
19 parties to the Agreement and therefore, treating them and BP the same doesn't mean
20 that Fox has not violated Section VIII(BB)(1). However, as BP sets forth,
21 "discrimination" is defined as "differential treatment; esp., a failure to treat all
22 persons equally when no reasonable distinction can be found between those favored

23 ⁸ Based on the determinations herein, the Referee need not address Fox's additional
24 argument that BP's Alvin soundtrack claim is time-barred. Similarly, the Referee need not
25 address Fox's additional argument that Paragraph 10(e) of the Agreement, which provides
26 that "if the Record Company agrees in writing to Owner to so account, Fox shall be
relieved of such obligations and Owner shall look solely to Record Company for such
record royalties," precludes The Squeakquel soundtrack claim.

27 ⁹ Denial of BP's summary judgment motion is correspondingly warranted, with the
28 exception of its claim based on Fox's failure to report any royalties on sales of over
300,000 Alvin soundtrack albums which is addressed in Section V.

1 and those not favored.” Black’s Law Dictionary (9th ed. 2009). Here, all royalty
2 participants were treated equally. With respect to Fox, Fox and BP are not similarly
3 situated as Fox is a profit participant and BP is a royalty participant. As Fox asserts,
4 nothing in the Agreement precludes this arrangement. As such, BP is not entitled to
5 summary judgment with respect to this claim.

6 **D. Breach of Contract Claim Based on the Licensing to HBO**

7 BP asserts a breach of contract claim for the underpayment of
8 contingent compensation on the pay-television licenses to HBO for Alvin and The
9 Squeakquel. It contends that in exchange for co-financing payments for these films
10 from New Regency, Fox relinquished control of the lucrative pay-TV licenses for the
11 films to New Regency (“Regency”). According to BP, Fox was willing to accept
12 reduced HBO payments for the pay-TV licenses for Alvin and The Squeakquel,
13 because by co-financing the films, Fox received more significant benefits by
14 mitigating its risk on the films. BP claims that it received no benefit from Fox’s
15 decision to seek co-financing monies from Regency, and as a result, BP received
16 \$261,720 less in contingent compensation than it otherwise would have. It argues
17 that Fox’s decision to co-finance with Regency was a “discriminatory” business
18 decision in violation of Section VIII(BB)(1) of the Agreement. Both parties seek
19 summary judgment with respect to BP’s claim.

20 Fox contends that the assertion it was “discriminatory” is impossible
21 because BP was treated the same as all others: all profit participants for the two
22 films had diminished revenue from HBO as a result of the co-financing of the
23 pictures with Regency, including Fox.

24 Section VIII of the Agreement requires Fox to exercise its business
25 judgment in exploiting films “on a reasonable and non-discriminatory basis.” The
26 Referee agrees with Fox that its decision to co-finance the films with Regency, or as
27 BP puts it “exploiting [the deals] in a manner that uniquely benefits Fox when BP
28 would otherwise have a right to a portion of the assets’ full value,” does not violate

1 this provision. First, Fox's Chairman during the relevant time period testified that he
2 decided to co-finance the two films because financial analysis showed that Fox could
3 lose \$19-\$20 million even if the first Alvin film garnered a respectable domestic box
4 office performance of \$50 million. (Ruga Decl., Ex. 1, Rothman Depo., 59:14-63:7,
5 70:13-76:7, 151:8-152:1.) He testified that the co-financing decision was the
6 difference between making the movie and not making the movie. (*Id.* at 75:20-76:7.)
7 BP benefited from Fox's decision to co-finance because it would have received
8 nothing by way of contingent compensation had it been decided that the risk of the
9 films was too great. Moreover, it is undisputed that all profit participants were
10 treated exactly the same as BP; in other words, all profit participants for the two
11 films had diminished revenue from HBO as a result of the co-financing of the
12 pictures with Regency, including Fox.

13 In sum, under both parties' undisputed definition of "discrimination"
14 (*see* Bagdasarian and Karman Opposition to Fox's Motion for Summary Judgment,
15 p. 21 n. 9), the Referee determines that Fox and BP are not similarly situated as only
16 Fox faced the risk of \$60 million in losses if Alvin did not produce substantial box
17 office proceeds. The co-financing decision resulted in diminished HBO revenue that
18 impacted both BP and Fox and contrary to BP's hypothetical situation, did not result
19 in Fox achieving any benefits on any other projects. Fox is therefore entitled to
20 summary judgment on this claim as a matter of law.

21 **IV. Motions for Summary Judgment Re Breach of Implied Contract Claims**

22 In the SAC, Karman asserts breach of implied contract claims alleging
23 that at Fox's request, Karman supplied screenwriting and graphic design services for
24 The Squeakquel, and that Karman was never compensated for these services. Both
25 Karman and Fox seek summary judgment with respect to these claims.

26 Under California Civil Code § 1621, an implied contract "is one, the
27 existence and terms of which are manifested by conduct." Such a contract exists
28 "where the circumstances preceding and attending [the offeror's performance],

1 together with the conduct of the offeree acting with knowledge of the circumstances,
2 show a promise [to pay] of the type usually referred to as implied or implied in fact.”
3 Grosso v. Miramax Film Corp., 383 F.3d 965, 967 (9th Cir. 2004) (quoting Desny v.
4 Wilder, 46 Cal. 2d 715, 738 (1956)). The Desny rule that an implied contract will be
5 enforced to compensate an individual who provides an idea to another “is justified on
6 the theory that the bargain is not for the idea itself, but for the services of conveying
7 that idea.” Grosso, 383 F.3d at 967. To avoid preemption by the Copyright Act, the
8 claim must allege an “extra element,” which for an implied contract claim is the
9 implied promise to pay. Id.

10 Contrary to Karman’s reliance on Spinelli v. Tallcot, 272 Cal. App.
11 2d589, 595 (1969), an implied contract will not be formed as long as services are
12 provided and accepted. See Desny, 46 Cal. 2d at 739 (“The law will not imply a
13 promise to pay for an idea from the mere facts that the idea has been conveyed, is
14 valuable, and has been used for profit.”); Faris v. Enberg, 97 Cal. App. 3d 309, 319
15 (1979) (“an obligation to pay could not be inferred from the mere fact of submission
16 on a theory that everyone knows that the idea man expects to be paid”). Rather, the
17 parties’ conduct must demonstrate a bilateral intent to compensate for the services.
18 See Grosso, 383 F.3d at 968 (noting that the “extra element” that makes an implied
19 contract claim avoid copyright preemption has been referred to as “the bilateral
20 expectation of compensation”); Montz v. Pilgrim Films & Television, Inc., 649 F.3d
21 975, 976 (9th Cir. 2011) (“the contractual claim requires that there be an expectation
22 on both sides that use of the idea requires compensation”).

23 A. Genuine Issues of Material Fact Exist With Respect to Karman’s
24 Breach of Implied Contract Claim Based on Her Writing Services

25 The following facts are found to be undisputed¹⁰:

26
27 ¹⁰ In finding that these facts are undisputed, the Referee reviewed Fox’s Evidentiary
28 Objections to Karman’s Separate Statement and Karman’s Responses to Fox’s Evidentiary
Objections, in addition to the Separate Statement, Statement of Genuine Disputes, and

1 On March 31, 2008, Karman provided Fox with a detailed treatment,
2 including specific scenes and dialog, for The Squeakquel. (Karman's PSJ, UF 1.)
3 Jon Vitti prepared the first draft of The Squeakquel screenplay, which he submitted
4 to Fox in mid-October. (*Id.* at UF 2.) Elizabeth Gabler, Karen Rosenfelt, Erin
5 Siminoff, Bagdasarian and Karman agreed that Vitti's mid-October 2008 draft of the
6 The Squeakquel screenplay was unacceptable. (*Id.* at UF 3.) At a meeting on
7 October 21, 2008, involving at least Gabler, Rosenfelt, Bagdasarian and Karman to
8 discuss the development of The Squeakquel screenplay, it was decided that Karman
9 would write the next draft of the screenplay. (*Id.* at UF 4.) Karman provided Fox
10 with the first 29 pages of her screenplay for The Squeakquel on October 22, 2008,
11 and provided Fox with a complete draft of her screenplay on November 10, 2008.
12 (*Id.* at UF 5.)

13 Elizabeth Gabler of Fox testified that she agreed to offer Karman a
14 writer's agreement to enable Karman to become a member of the Writer's Guild.
15 (Karasik Decl., Ex. X, Gabler Depo., pp. 108:12-109:5.) On October 21, 2008,
16 Gabler instructed Karen Rosenfelt and Erin Siminoff to contact Fox Business Affairs
17 to implement this decision. Steven Plum in Fox Business Affairs was advised to
18 make an offer of a writer's agreement including the minimum (i.e., "scale")
19 compensation compliant with the Writers Guild Basic Agreement. (UF 8; Karasik
20 Decl., ¶ 33, Ex. X, Gabler Depo. at 106:4-109:12; Plum Decl., ¶¶ 17-22, Exs. 6-7.)
21 On October 22, 2008, Fox (through Plum) offered Karman (through Waterman)
22 additional compensation of \$29,250 for writing a screenplay, an offer that was based
23 on the Writers Guild of America's ("WGA") guidelines for compensation for non-
24 WGA writers with no precedent. (UF 9; Plum Decl., ¶¶ 20-21, Ex. 7; Karasik Decl.,
25 ¶ 35, Ex. E, Bagdasarian Depo. 304:5-23.) On October 24, 2008, after Karman had
26

27 Reply to Statement of Genuine Disputes. Rulings on the objections shall be deemed
28 consistent with the findings of fact when applicable.

1 submitted the first 29 pages of her re-write, Fox revised its initial offer and offered
2 Karman \$100,000 in additional compensation for any writing services Karman might
3 render in connection with The Squeakquel, with a bonus of \$50,000 if Karman
4 received sole writing credit from the WGA and \$25,000 bonus if she received share
5 credit from the WGA. (Plum Decl., ¶¶ 22-24, Exs. 7-8; Karasik Decl., ¶ 35, Ex. E,
6 Bagdasarian Depo., 304:24-305:9.) Between October 21, 2008 and December 10,
7 2008, Karman was the person actively writing on The Squeakquel screenplay. (*Id.* at
8 UF 10.) In early 2009, Karman rejected Fox's offer. Fox has refused to pay Karman
9 additional compensation for the writing she submitted on The Squeakquel. (*Id.* at UF
10 16.)

11 At the outset, the Referee notes that the time period at issue is from
12 October 21 through December 10. (*See* Karman Reply, p. 2 n. 1 ("In this motion,
13 however, we have focused on the services Karman provided from October 21
14 through December 10 because it cannot be disputed that Fox requested these
15 services."))¹¹ This is the time period when Vitti's draft of The Squeakquel
16 screenplay was deemed unacceptable, and it was decided that Karman would write
17 the next draft of the screenplay. (Karman PSJ, UF 4.) In support of her claim,
18 Karman contends that an implied contract was formed between Fox and Karman
19 whereby Karman agreed to, and did in fact, provide writing services on The
20 Squeakquel at Fox's request and that Karman expected to be paid, and Fox agreed to
21 pay, for those services. She concludes that Fox is liable to Karman for the
22 reasonable value of those services, despite the fact that the parties never executed a
23 written agreement. Fox, on the other hand, asserts that the undisputed facts show
24 that Karman lacked an expectation of additional compensation for any supposed
25

26 ¹¹ At the hearing, Plaintiffs clarified that they focused on this time period in support of their
27 Motion for Partial Summary Judgment, and that with respect to Fox's Motion for Summary
28 Judgment, if they successfully establish their claim during this time period or raise a triable
issue, then Fox's motion for summary judgment on this claim cannot be granted.

1 writing services, and that it had no expectation to compensate Karman.

2 The Referee finds that genuine issues of material fact exist precluding
3 summary judgment in favor of either party. At issue is the bilateral expectation of
4 compensation. Based on the undisputed facts that Fox offered Karman a writer's
5 agreement, which included compensation, and that the parties negotiated the amount
6 of compensation, reasonable inferences can be drawn in favor of both parties whether
7 Fox expected to compensate Karman, and whether Karman expected compensation.
8 While Fox claims that it never expected to compensate Karman and that it only
9 offered her money "in appreciation for Karman's contributions" and to allow her to
10 become a member of the WGA, a trier of fact could find otherwise. Steve Plum
11 testified with respect to what Fox contemplated prior to its initial offer:

12 I think in the initial conversation I had with Erin Siminoff and Karen
13 Rosenfelt, I asked them if they had a point of view about whether
14 [Karman] was going to get paid, and they did have a point of view. So
15 prior to my first conversation with Janice's representative, I had an
understanding that our side was contemplating paying her on that.

* * *

16 What I would say is they expected that she would have a writer's
17 agreement which would have compensation involved in the writer's
18 agreement, yes.

19 (Dixon Decl., Ex. 22, Plum Depo., 52:25-54:1.) With respect to the ensuing
20 negotiations, Fox's initial offer to Karman was rejected as too low by Steve
21 Waterman, Karman's representative. (Dixon Decl., Ex. 6 at p. 10.) Following this,
22 Fox then offered Karman "\$100,000 for an 'all writing' deal that would extend to
23 any further screenplay materials she might prepare in connection with The
24 Squeakquel." (*Id.*) In addition, while Fox claims that Karman began writing the
25 screenplay prior to any offers of compensation, a trier of fact could reasonably infer
26 that Karman expected to be compensated and that Fox expected to compensate her
27 because it is undisputed that Karman was the only writer on the project during the
28 timeframe of October 21 and December 10, 2008. It was during this timeframe that

1 Karman wrote the next draft of The Squeakquel screenplay, because the screenplay
2 by Vitti, who was hired by Fox, was deemed unacceptable. Furthermore, the other
3 writers on The Squeakquel received compensation for their similar work on the
4 screenplay. Fox paid the writing teams of Aibel & Berger and McRobb & Viscardi a
5 total of \$800,000 for their work on The Squeakquel screenplay.¹² (See Dixon Decl.,
6 Ex. 41 at BP00021934-BP00021935.) Thus, these facts, when viewed in the light
7 most favorable to the nonmoving party, demonstrate disputed issues of material fact.

8 Fox argues that under Paragraph 21(c) of the ST&C's of the Agreement,
9 there cannot be an implied agreement because additional payment for Karman's
10 writing services would necessarily require a written agreement. The Referee
11 disagrees. Paragraph 21(c) provides: "This Agreement may be amended or modified
12 only by the written agreement of Owner and Fox." However, the Agreement does
13 not encompass the writing services at issue here. Instead, it addresses Fox's
14 purchase of the underlying rights to the Chipmunk characters and covers only the
15 producer services of Karman and Bagdasarian. (See Agreement, ¶ 5 (engaging
16 Karman and Bagdasarian to perform services "customarily rendered by producers in
17 the motion picture industry, including supervision of the screenplay materials
18 required by Fox").) As such, the cases relied on by Fox for the proposition that an
19 implied contract cannot exist where an express contract exists concerning the same
20 subject matter are inapposite. Because Karman's writing services at issue here are
21 outside the scope of the Agreement, it cannot be found that the Agreement already
22 covered the same subject matter. Furthermore, the fact that Fox offered Karman an
23 "all writing" writer's agreement belies Fox's assertion that Karman's writing
24 services were part of her obligations pursuant to the Agreement. And, as noted

25
26 ¹² Similarly, although Fox argues that Karman had previously provided written materials
27 without any expectation of compensation, Karman is correct that the instances showing that
28 she voluntarily submitted her writings do not necessarily preclude a finding in her favor
regarding the October rewrite of the Vitti screenplay which was of a different nature than
her prior work.

1 above, Karman's rewrite of the screenplay was similar to the work for which Fox
2 compensated other writers, thereby supporting the determination that Karman's
3 writing services at issue were outside the scope of the Agreement and therefore not
4 requiring a written agreement as a matter of law.

5 In sum, an implied contract claim requires a showing of a bilateral
6 expectation of compensation. Because reasonable inferences can be drawn in favor
7 of both parties regarding the existence or absence of the bilateral expectations of
8 compensation, genuine issues of material fact exist. Summary judgment is therefore
9 not warranted in favor of either party on the implied contract claim for Karman's
10 writing services.

11 **B. Karman Fails to Establish an Implied Contract With Respect to**
12 **Her Graphic Design Services**

13 Karman claims that in or around March 2008, Fox asked Karman to
14 design Brittany, Jeanette, and Eleanor (the Chipettes) for The Squeakquel. (Karman
15 PSJ, Ex. 18 at 150:6-14; Ex. 8 at 255:19256:11.) She claims that at Fox's request,
16 she created pencil sketches re-imagining Brittany, Jeanette, and Eleanor so that they
17 could be turned into CGI (computer-generated imagery) characters for The
18 Squeakquel. (*Id.* at Ex. 18 at 150:6-14, 166:23-167:2; Ex. 8 at 255:19-256:11; Ex.
19 47.) She claims that she presented her pencil sketches to Fox in or around June
20 2008, and Fox loved them. (*Id.* at Ex. 8 at 255:19-256:11; Ex. 47.) On July 1, 2008,
21 Karman provided her pencil sketches to Rhythm & Hues, which Fox had hired to
22 create 2D CGO images of the Chipettes for The Squeakquel. (*Id.* at Exs. 48, 49, 47,
23 51.) Karman claims that Rhythm & Hues, with her assistance, turned Karman's
24 pencil sketches into 2D CGO characters for The Squeakquel. (*Id.* at Ex. 47, 55.)

25 Based on the above and in seeking summary judgment, Karman
26 contends that an implied contract was formed between Fox and Karman whereby
27 Karman agreed to, and did in fact, provide graphic design services on The
28

1 Squeakquel at Fox's request, and that Karman expected to be paid for those services,
2 which are of the type of services that Fox usually pays for. Karman concludes that
3 Fox is therefore liable to Karman for the reasonable value of those services.

4 Fox argues that during the period of time that Karman claims to have
5 provided services, it was never aware of the pencil sketches that Karman now claims
6 she created and which are basis for her motion. Fox claims that no one from Fox
7 ever asked Karman to prepare any pencil sketches or other drawings of the Chipette
8 characters for use in connection with The Squeakquel. (Garberson Decl., ¶ 14;
9 Gabler Decl., ¶ 4; Ruga Decl., Ex. 20, Garberson Depo. at 67:25-69:4.) It claims that
10 it was not even informed that Karman was providing or had provided any 2D artwork
11 of the Chipettes to R&H until after the 2D design process was complete. (Garberson
12 Decl., ¶¶ 11-14, Ex. D; Karasik Decl., ¶ 40, Ex. BB.) Fox claims that it never
13 offered to compensate Karman for any graphic design services and at no time had
14 any expectation that it was obligated to pay Karman for providing graphic design
15 services directed to any characters, including the Chipettes, for The Squeakquel.
16 (Plum Decl., ¶ 28; Karasik Decl., Ex. E, Bagdasarian Depo. at 256:19-257:19, Ex.
17 BB; Garberson Decl., ¶¶ 12-14.)

18 The Referee finds that Karman's implied contract claim based on her
19 graphic design services fails as a matter of law. First, it is questionable whether
20 Karman has shown that Fox knew about her design services at the time. The only
21 undisputed evidence that Karman relies on is her testimony that she believed that
22 Karen Rosenfelt, the independent third-part producer on the films, knew that she was
23 going to design the Chipettes. (Karman PSJ, Ex. 18, Karman Depo. at 150:6-21.)
24 The evidence is undisputed that no one at Fox knew Karman had provided any 2D
25 artwork for the Chipettes to R&H until August 2008 when the 2D design process was
26 complete. (Fox's Response to Plaintiffs' Statement of Genuine Issues, UF 83.)
27 While Karman argues that Rosenfelt was "acting on behalf of Fox," this argument of
28

1 course raises the issue and requisite proof of agency.

2 Nonetheless, the issue is whether Karman has shown a bilateral intent to
3 compensate, and she has not. First, it is undisputed that during the development of
4 Alvin (the first film), Karman provided Fox with certain two-dimensional drawings
5 of the Chipmunk characters that had been prepared by a third-party. Fox never
6 requested these materials, and Karman had no expectation of compensation with
7 respect to this submission. (Karasik Decl., ¶ 38, Ex. P, Karman Depo., 129:1-130:2,
8 132:18-134:17; Gaberson Decl., ¶¶ 7-8, Ex. C.) As Fox states, based on Karman
9 providing Fox with graphic design materials on the first film with no expectation or
10 demand for compensation, Fox at no time believed it had any obligation to pay
11 Karman additional compensation for any graphic design activity. Indeed, “[i]f at the
12 time the services were originally rendered they were intended to be gratuitous or as
13 an accommodation, motivated by friendship, kindness, or some other significant
14 relationship existing between the parties, and were tendered without any expectation
15 of remuneration, they cannot afterwards be converted into an obligation to pay their
16 reasonable value under the theory of an implied contract.” Payne v. Bank of Am.
17 Nat’l Trust & Sav. Ass’n, 128 Cal. App. 2d 295, 304 (1954).

18 Karman seeks to show that Fox intended to compensate her by relying
19 on evidence that Fox paid another individual for the same service on Alvin, the first
20 picture. However, this cannot establish that Fox intended to compensate Karman for
21 her services on The Squeakquel. First, Fox did pay for this service on The
22 Squeakquel. It hired R&H, a professional motion picture graphic design firm, to
23 design the Chipettes, ultimately paying it \$55,000 for nine weeks of design services
24 relating to the preparation of those materials. (Garberson Decl., ¶¶ 10-11, 14; Ruga
25 Decl., Ex. 20, Garberson Depo. at 67:25-69:4.) Moreover, that Karman may have
26 expected compensation because she knew that Fox had paid for such services on
27 Alvin cannot establish her claim. “The assumption, intention or expectation of either
28

1 party alone, not made known to the other, can give rise to no inference of an implied
2 contract.” Travelers Fire Ins. Co. v. Brock & Co., 47 Cal. App. 2d 387, 392 (1941);
3 see also City of Pasadena v. Los Angeles Cnty., 118 Cal. App. 2d 497, 500 (1953)
4 (finding no implied contract because although services were performed that
5 benefitted defendant, they were never requested by defendant). Furthermore, it is
6 undisputed that neither Karman nor anyone on her behalf requested or expressed an
7 expectation of additional compensation for Karman’s services designing the
8 Chipettes until after the work had been completed. (Fox’s Response to Plaintiffs’
9 Statement of Genuine Disputes, UF 82, 86.) “It is the expectation of the parties
10 existing at the time the services were rendered or the benefits conferred that
11 controls.” Payne, 128 Cal. App. 2d at 304.

12 Thus, because Karman cannot establish a breach of implied contract
13 claim based on her graphic design services, summary judgment in favor of Fox is
14 warranted.

15 **V. Fox’s Application Pursuant to FRCP 56(d)**

16 In its Motion for Partial Summary Judgment on Certain Breach of
17 Contract Claims, BP contends that Fox breached Paragraph 10(a) of the Agreement
18 by failing to report any royalties on sales of over 300,000 Alvin soundtrack albums.
19 Specifically, BP contends that Fox underreported the number of units sold to BP
20 through December 31, 2012, by 307,984 units, resulting in the underpayment of BP’s
21 soundtrack royalty by \$581,430. It also contends that Fox does not appear to have
22 accounted to BP for revenue from Digital Streams, resulting in the underpayment of
23 royalties of at least \$11,536. In making these contentions, BP relies on the expert
24 Declaration of Christian Tregillis, a forensic accountant.

25 In response, Fox argues that this “underreporting” claim rests entirely
26 on a comparison between “units shipped” (less reserves and returns, as reported on
27 Fox’s profit-sharing statement) and royalty-bearing units (as reported in the
28

1 statements to BP), but Fox and BP are accounted to on different bases, and reported
2 unit counts are accordingly different. It claims that BP's asserted difference in unit
3 counts is attributable in substantial part to "free goods," which are records that are
4 given away as incentives to retailers, not sold. Fox states that it has not had an
5 opportunity to present its evidence or depose Mr. Tregillis about his analysis because
6 expert discovery has not yet commenced.¹³ It asserts Evidentiary Objections to the
7 Tregillis Declaration, and it brings an Application Pursuant to Rule 56(d) to depose
8 Tregillis and to present its own expert's conclusions in a timely manner.¹⁴

9 Fed. R. Civ. Pro. 56(d) provides relief where "the party opposing
10 summary judgment makes (a) a timely application which (b) specifically identifies
11 (c) relevant information, (d) where there is some basis for believing that the
12 information sought actually exists." VISA Int'l Serv. Ass'n v. Bankcard Holders of
13 Am., 784 F.2d, 1472, 1475 (9th Cir. 1986); accord Burlington N. Santa Fe. R.R. Co.
14 v. Assinboine & Sioux Tribes of the FortPeck Reservation, 323 F.3d 767, 774-75
15 (9th Cir. 2003). Once "a nonmovant shows by affidavit or declaration that, for
16 specified reasons, it cannot present facts essential to justify its opposition" the Court
17 may defer considering the motion, deny it, allow time for the nonmoving party to
18 obtain declarations or conduct discovery, or issue any other appropriate order. Fed.
19 R. Civ. P. 56(d).

20 Fox states that Plaintiffs gave it no notice during the parties' meet and
21 confer over the motions for summary judgment that they intended to rely on expert
22 declarations. (Ruga Dec., ¶4.) It claims that it learned of these expert declarations

23 ¹³ According to the Referee's July 23, 2013 Scheduling Order, Initial Expert
24 Disclosures are not due until February 10, 2014, Rebuttal Expert Disclosures are not
25 due until February 24, 2014, and the Expert Discovery deadline is March 30, 2014.

26 ¹⁴ In its Application, Fox also seeks to depose another expert relied on by BP, Frederic
27 Bernstein. However, the issue related to that testimony (the implied contract claim) has
28 been resolved herein, and Fox's request related and objections to this expert are therefore
moot.

1 when they were received along with Plaintiffs' moving papers only on November 8.
2 (Id.) Fox states that it intends to offer evidence through cross-examination of
3 Tregillis that establishes the flaws and mistaken assumptions of his analysis. (Ruga
4 Decl., ¶¶ 7-10.) Fox will demonstrate that Tregillis's conclusions relating to the
5 alleged underreporting of units and royalties are simply incorrect. (Id.) Fox has
6 retained accounting and industry experts who will provide testimony demonstrating
7 that units were not underreported and that Tregillis's conclusions are flawed and
8 based on his improper comparison of statements reported to two different types of
9 participants – profit share participants and royalty participants. (Ruga Dec., ¶9.)

10 Based on Fox's showing in its Application, and having read BP's
11 Opposition, and Fox's Reply, the Referee finds that Fox has met its burden under
12 Rule 56(d), and that granting its application is warranted. As such, the Referee
13 grants Fox's Application Pursuant to Federal Rule of Civil Procedure 56(d) to allow
14 Fox to depose Mr. Tregillis and conduct expert discovery with respect to the
15 remaining issue identified herein. {**Insert Timing and restrictions**} Ruling on
16 this remaining issue in Bagdasarian's Motion for Partial Summary Judgment on
17 Certain Breach of Contract Claims is deferred, and the Declaration of Tregillis is
18 stricken as premature.

19 **VI. Conclusion**

20 Accordingly, the Referee:

21 (1) Grants in Part and Denies in Part Defendant Twentieth Century Fox Film
22 Corporation's Motion for Summary Judgment;

23 (2) Denies Plaintiff Bagdasarian Productions, LLC's Motion for Partial
24 Summary Judgment on Certain Breach of Contract Claims, with the exception of one
25 claim, the determination of which is deferred;

26 (3) Denies Plaintiff Janice Karman's Motion of Partial Summary Judgment on
27 Implied Contract Claims; and
28

1 (4) Grants Fox's Application Pursuant to FRCP 56(d) as set forth herein.
2

3 DATED: February 11, 2014
4



5 Carl J. West
6 Judge of the Superior Court (Ret.)
7 Referee
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PROOF OF SERVICE BY U.S. MAIL

Re: Bagdasarian Productions LLC et al. vs. Twentieth Century Fox Film Corporation
Reference No. 1220044628

I, Kathryn Cisneros, not a party to the within action, hereby declare that on February 11, 2014 I served the attached ORDER DATED FEBRUARY 11, 2014 on the parties in the within action by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, Los Angeles, CALIFORNIA, addressed as follows:

Steven A. Marenberg Esq.
Irell & Manella, LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067
Parties Represented:
Bagdasarian Productions, LLC
Janice Karman

Rachel M. Capoccia Esq.
Louis Karasik Esq.
Casondra K. Ruga Esq.
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333 S. Hope St.
16th Floor
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Parties Represented:
Twentieth Century Fox Film Corp.

Hon. Michael W. Fitzgerald
U.S. District Court
312 N. Spring St.
#G-8
Los Angeles, CA 90012-4793

Douglas J. Dixon Esq.
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840 Newport Center Drive
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Parties Represented:
Bagdasarian Productions, LLC
Janice Karman

Jonathan Gottlieb Esq.
Fox Group Legal
P.O. Box 900
Beverly Hills, CA 90213-0900
Parties Represented:
Twentieth Century Fox Film Corp.

I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA, on February 11, 2014.

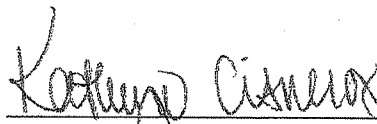
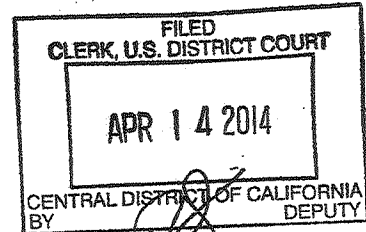

Kathryn Cisneros

EXHIBIT 6

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5 Los Angeles, CA 90017
6 Tel: 213-620-1133
7 Fax: 213-620-010

8 Referee



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 BAGDASARIAN PRODUCTIONS, LLC, a
11 California limited liability company, and
12 JANICE KARMAN, an individual,

13 Plaintiffs,

14 v.

15 TWENTIETH CENTURY FOX FILM
16 CORPORATION, a Delaware corporation,

17 Defendant.

Case No.: CV102991MWF (JCGx)

Referred under Cal. Code Civ. Proc.
Section 638 to:

Hon. Carl J. West (Ret.)

JAMS Reference No. 1220044628

**~~PROPOSED~~ ORDER RE:
STIPULATION TO UNDISPUTED
FACTS AND REQUEST FOR
FURTHER ORDER ON CROSS-
MOTIONS FOR SUMMARY
JUDGMENT (SUPPLEMENTING
PRIOR ORDER DATED FEBRUARY
11, 2014)**

[Stipulation To Undisputed Facts and
Request For Further Order On Cross-
Motions For Summary Judgment
(Supplementing Prior Order Dated
February 11, 2014) filed concurrently
herewith]

~~PROPOSED~~ ORDER

ORDER

This Court, having read and considered the Stipulation To Undisputed Facts and Request For Further Order On Cross-Motions For Summary Judgment (Supplementing Prior Order Dated February 11, 2014) ("Stipulation") of plaintiffs Bagdasarian Productions, LLC ("Bagdasarian") and Janice Karman's ("Karman") (collectively "Plaintiffs") and defendant Twentieth Century Fox Film Corporation's ("Fox"), and having considered the evidence and pleadings in the record, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. Summary judgment is granted to Fox on Bagdasarian's breach of contract claim for underreporting of units on the *Alvin and the Chipmunks* ("Alvin") soundtrack album for the reasons set forth in the Stipulation;

2. Summary judgment is granted to Fox on Karman's claim for breach of implied contract for her alleged writing services for *Alvin and the Chipmunks: The Squeakquel* for the reasons set forth in the Stipulation;

3. Except as set forth above, the Referee's Order on the parties' cross-motions for summary judgment dated February 11, 2014 remains unchanged; and

4. The adjudications provided for herein shall be included in the Referee's Statement of Decision.

IT IS SO ORDERED:

DATED: 4/14/14


Honorable Carl J. West

PROOF OF SERVICE BY U.S. MAIL

Re: Bagdasarian Productions LLC et al. vs. Twentieth Century Fox Film Corporation
Reference No. 1220044628

I, Kathryn Cisneros, not a party to the within action, hereby declare that on July 16, 2014 I served the attached STATEMENT OF DECISION on the parties in the within action by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, Los Angeles, CALIFORNIA, addressed as follows:

Steven A. Marenberg Esq.
Irell & Manella, LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067
Parties Represented:
Bagdasarian Productions, LLC
Janice Karman

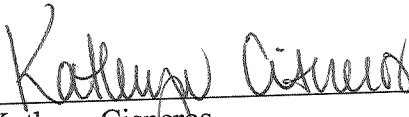
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Los Angeles, CA 90071-1410
Parties Represented:
Twentieth Century Fox Film Corp.

Hon. Michael W. Fitzgerald
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Parties Represented:
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Janice Karman

Jonathan Gottlieb Esq.
Fox Group Legal
P.O. Box 900
Beverly Hills, CA 90213-0900
Parties Represented:
Twentieth Century Fox Film Corp.

I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA, on July 16, 2014.


Kathryn Cisneros